

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
07 JUN -4 AM 8:10
BY RONALD R. CARPENTER
CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 78979-7
Respondent,)	
)	REPLY TO
vs.)	PETITIONER'S ANSWER
)	TO STATE'S MOTION
MITCHELL LEE VARNELL,)	TO STRIKE
)	
Petitioner.)	

I. FACTS RELEVANT TO REPLY

The petitioner was charged with five counts of solicitation to commit first-degree murder, the last four, Counts II through V arising from his offering of money to an undercover officer, posing as a "hit" man, to kill his ex-wife Karen Varnell, her brother Stephen Worbass, and her parents Jack and Juanita Worbass. 4 CP 617-18. Each count involved a different person. Id. The jury received separate to-convicted instructions for each intended victim, 3 CP 554-57 (instructions 11 through 14), and rendered separate verdicts on each. 3 CP 536-39 (verdict forms B, C, D, and E).

In briefing to the Court of Appeals, the petitioner argued the ‘unit of prosecution’ should be for each solicitation, BOA 31-38. Separately, he argued the court’s determination of “separate and distinct criminal conduct” under RCW 9.94A.589(1) for sentencing purposes was a violation of Blakely¹ and Apprendi,² BOA 40-47.

The Court of Appeals concluded the unit of prosecution is each solicitation for conduct constituting a murder. State v. Varnell, 132 Wn. App. 441, 452-53, 132 P.3d 772 (2006). In the unpublished portion of its opinion, it rejected petitioner’s Blakely/Apprendi argument as foreclosed by this Court’s decision in State v. Cubias.³ State v. Varnell, ¶¶ 30-31. This Court granted review on the unit of prosecution issue only. Order of April 7, 2007. In supplemental briefing, the petitioner incorporated his Blakely argument into his unit of prosecution claim, arguing that the Court of Appeals’ conclusion that the unit of prosecution was victim-specific required a jury finding. Appellant’s Suppl. Brf. at 4, 10-13. The State moved to strike this argument. In answer, the petitioner argues that his new Blakely argument is merely “another method”

¹ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

² Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

³ 155 Wn.2d 549, 553-54, 120 P.3d 929 (2005).

of presenting “unit of prosecution” analysis, that it is within the “reasoned scope” of the issue on which review was granted, and that this Court should not “blind itself to obvious constitutional problems.” Petitioner’s Answer to State’s Motion to Strike 5-6.

II. ARGUMENT IN REPLY

The Court has limited review to the “unit of prosecution” issue only. See RAP 13.7(b). This is at root an issue of statutory construction. State v. Adel, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998). Petitioner’s new Blakely argument is something altogether different, and is thus outside the scope of the grant of review. His answer to the motion to strike provides no sound reason to now include it. This Court does not have the benefit of briefing below on the claim, nor did Division One have any opportunity to analyze it. A new argument raised for the first time in supplemental briefing should not be addressed by this Court. State v. Williams, 158 Wn.2d 904, 908 n.1, 148 P.3d 993 (2006). Since the jury rendered separate verdicts on separate to-convict instructions, there is no “obvious constitutional problem” that would thereby be ignored. See State v. Cubias, 155 Wn.2d 549, 553-54, 120 P.3d 929 (2005).

III. CONCLUSION

The petitioner's Blakely argument in his supplemental brief should be *stricken*.

RESPECTFULLY SUBMITTED this 1st day of June, 2007.



CHARLES BLACKMAN, WSBA 19354
Deputy Prosecuting Attorney
Attorney for Respondent

APPENDICES

Appendix A – Amended Information, 4 CP 617-18

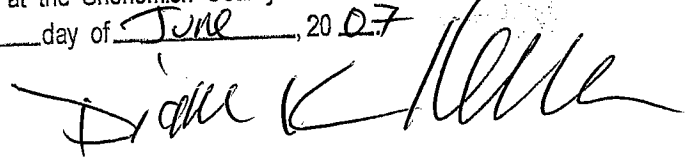
Appendix B – Court's Instructions 11 through 14, 3 CP 554-57

Appendix C – Verdict Forms B, C, D, & E, 3 CP 536-39

On this day I mailed a properly stamped envelope addressed to the attorney for the defendant that contained a copy of this document.

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office
this 1 day of June, 20 07



FILED

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PAM L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

VARNELL, MITCHELL LEE

Defendant.

No. 02-1-00390-1

AMENDED INFORMATION

Aliases:

Other co-defendants in this case:

Comes now James H. Krider, Prosecuting Attorney for the County of Snohomish, State of Washington, and by this, his information, in the name and by the authority of the State of Washington, charges and accuses the above-named defendant(s) with the following crime(s) committed in the State of Washington:

COUNT I: SOLICITATION TO COMMIT MURDER IN THE FIRST DEGREE, committed as follows: That the defendant, between the 20th day of January, 2002, through the 13th day of February, 2002, with intent to promote or facilitate the commission of Murder in the First Degree, to-wit: with premeditated intent to cause the death of another person (Karen Varnell), did cause the death of another person on a date certain, did offer to give or gave money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission, had such crime been attempted or committed; proscribed by RCW 9A.28.030 and 9A.32.030(1)(a), a felony.

COUNT II: SOLICITATION TO COMMIT MURDER IN THE FIRST DEGREE, committed as follows: That the defendant, on or about February 16, 2002, with intent to promote or facilitate the commission of Murder in the First Degree, to-wit: with premeditated intent to cause the death of Karen Varnell, did cause the death of another person on a date certain, did offer to give or gave money or other things of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission, had such crime been attempted or committed; proscribed by RCW 9A.28.030 and 9A.32.030(1)(a), a felony.

[4 CP 617]

APPENDIX A


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COUNT III: SOLICITATION TO COMMIT MURDER IN THE FIRST DEGREE, committed as follows:
That the defendant, on or about February 16, 2002, with intent to promote or facilitate the commission of Murder in the First Degree, to-wit: with premeditated intent to cause the death of Jack Worbass, did cause the death of another person on a date certain, did offer to give or gave money or other things of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission, had such crime been attempted or committed; proscribed by RCW 9A.28.030 and 9A.32.030(1)(a), a felony.

COUNT IV: SOLICITATION TO COMMIT MURDER IN THE FIRST DEGREE, committed as follows:
That the defendant, on or about February 16, 2002, with intent to promote or facilitate the commission of Murder in the First Degree, to-wit: with premeditated intent to cause the death of Juanita Worbass, did cause the death of another person on a date certain, did offer to give or gave money or other things of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission, had such crime been attempted or committed; proscribed by RCW 9A.28.030 and 9A.32.030(1)(a), a felony.

COUNT V: SOLICITATION TO COMMIT MURDER IN THE FIRST DEGREE, committed as follows:
That the defendant, on or about February 16, 2002, with intent to promote or facilitate the commission of Murder in the First Degree, to-wit: with premeditated intent to cause the death of Steven Worbasse, did cause the death of another person on a date certain, did offer to give or gave money or other things of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission, had such crime been attempted or committed; proscribed by RCW 9A.28.030 and 9A.32.030(1)(a), a felony.

JAMES H. KRIDER
PROSECUTING ATTORNEY


JOHN E. STANSELL, 13915
Deputy Prosecuting Attorney

Address: 13510 JORDAN TRAILS RD ARLINGTON WA 98223
HT: 6'0 DOB: 06/21/1961 SID: WA
WT: 196 SEX: FBI:
EYES: Green RACE: White DOC:
HAIR: Brown DOL: VARNE-ML-396L1, WA
ORIGINATING AGENCY: SNOHOMISH COUNTY SHERIFF'S AGENCY CASE#: 0203092
OFFICE

INSTRUCTION NO. 11

To convict the defendant of the crime of criminal solicitation as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of February, 2002, the defendant offered to give money to another to engage in specific conduct relating to Karen Varnell;
- (2) That such offering was done with the intent to promote or facilitate the commission of the crime of First Degree Murder;
- (3) That the specific conduct of the other person would constitute the crime of First Degree Murder; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

[3 CP 554]

APPENDIX B

INSTRUCTION NO. 12

To convict the defendant of the crime of criminal solicitation as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of February, 2002, the defendant offered to give money to another to engage in specific conduct relating to Jack Worbass;
- (2) That such offering was done with the intent to promote or facilitate the commission of the crime of First Degree Murder;
- (3) That the specific conduct of the other person would constitute the crime of First Degree Murder; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

[3 CP 555]

INSTRUCTION NO. 13

To convict the defendant of the crime of criminal solicitation as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of February, 2002, the defendant offered to give money to another to engage in specific conduct relating to Juanita Worbass;
- (2) That such offering was done with the intent to promote or facilitate the commission of the crime of First Degree Murder;
- (3) That the specific conduct of the other person would constitute the crime of First Degree Murder; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

To convict the defendant of the crime of criminal solicitation as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of February, 2002, the defendant offered to give money to another to engage in specific conduct relating to Steven Worbass;
- (2) That such offering was done with the intent to promote or facilitate the commission of the crime of First Degree Murder;
- (3) That the specific conduct of the other person would constitute the crime of First Degree Murder; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Filed in Open Court

July 16 20 03
PAM L. DANIELS

COUNTY CLERK

By J. Krist Ballen
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON

Plaintiff,

v.

MITCHELL LEE VARNELL,

Defendant.

CASE NO. 02-1-00390-1

VERDICT FORM B

We, the jury, find the defendant MITCHELL LEE VARNELL,

Guilty

(write in not guilty or guilty)

of the crime of Solicitation to Commit Murder in the First Degree, as charged in Count II.

DATED this 16th day of July 2003.

Richard S. Lead
PRESIDING JUROR

Filed in Open Court

July 16 2003

PAM L. DANIELS

COUNTY CLERK

By

Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON

Plaintiff,

v.

MITCHELL LEE VARNELL,

Defendant.

CASE NO. 02-1-00390-1

VERDICT FORM C

We, the jury, find the defendant MITCHELL LEE VARNELL,

Guilty

(write in not guilty or guilty)

of the crime of Solicitation to Commit Murder in the First Degree, as charged in Count

III.

DATED this 16th day of July, 2003.

Richard S. Lead
PRESIDING JUROR

[3 CP 538]

B
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Filed in Open Court

July 16 2003

PAM L. DANIELS

COUNTY CLERK

By

Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON

Plaintiff,

v.

MITCHELL LEE VARNELL,

Defendant.

CASE NO. 02-1-00390-1

VERDICT FORM D

We, the jury, find the defendant MITCHELL LEE VARNELL,

Guilty
(write in not guilty or guilty)

of the crime of Solicitation to Commit Murder in the First Degree, as charged in Count

IV.

DATED this 11th day of July, 2003

Richard S. Leach
PRESIDING JUROR

[3 08537]

A3
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Filed in Open Court
July 16 2003
PAM L. DANIELS
COUNTY CLERK
By [Signature]
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON

Plaintiff,

v.

MITCHELL LEE VARNELL,

Defendant.

CASE NO. 02-1-00390-1

VERDICT FORM E

We, the jury, find the defendant MITCHELL LEE VARNELL,

Guilty
(write in not guilty or guilty)

of the crime of Solicitation to Commit Murder in the First Degree, as charged in Count V.

DATED this 16th day of July, 2003.

[Signature]
PRESIDING JUROR

[3 4 536]

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